

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.207 of 1993

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{Against the Judgment of conviction dated 04.03.1993 and sentence Order dated 06.03.1993 passed by the learned Additional Sessions Judge-I, Gopalganj, in Sessions Trial Case No.252 of 1991}.

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Devendra Dubey, son of Bhola Dubey, resident of village-Harpur, P.S. Kuchaikot, District-Gopalganj.

... .. Appellant.

Versus

The State of Bihar

... .. Respondent.

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Appearance :

For the Appellant	:	Mr. Bishnu Kant Dubey, Advocate. Mr. Ranjit Kumar, Advocate. Mr. Sanjeev Kumar, Advocate.
For the State	:	Mr. Dilip Kumar Sinha, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
and
HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date : 11-02-2019

This appeal is directed against the Judgment of conviction dated 04.03.1993 and sentence order dated 06.03.1993 passed by the learned Additional Sessions Judge-I, Gopalganj, in Sessions Trial Case No.252 of 1991, by which and whereunder the sole appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life for the above stated offence.



2. P.W.7 Deenanath Dubey gave his fardbeyan on 27.11.1990 at about 11.30 A.M. to P.W.10 Mithilesh Kumar Singh in presence of Deviramji Dubey (P.W.3) to this effect that on the same day at about 10.00 A.M., he along with his elder son, namely, Amarendra Kumar Dubey (P.W.2), and the deceased Vijay Kumar Dubey was sitting at his door. In the meantime, the appellant Devendra Dubey having dagger in his hand along with his son, namely, Sanjay Dubey alias Jhuman Dubey, came there and started abusing him and also asked as to why he had brought 'Phathar', upon which P.W.7 claimed that the aforesaid 'Phathar' belonged to him and the same was given to him by one Banka Sonar but the appellant and his son Sanjay Dubey alias Jhuman Dubey became furious and Sanjay Dubey alias Jhuman Dubey caught hold his son, namely, Vijay Kumar Dubey (deceased), whereas the appellant gave one dagger blow on the chest of the deceased Vijay Kumar Dubey. P.W.7 and P.W.2 raised alarm, which attracted Yogendra Kamkar and Bhrignath Dubey as well as several other persons, who assembled there and witnessed the occurrence. The alleged occurrence took place on account of the above stated 'Phathar'. P.W.7 brought his injured son Vijay Kumar Dubey to Sasamusa for treatment but his son died.



3. On the basis of the fardbeyan of P.W.7, Kuchaikot P.S. Case No.122 of 1990 for the offence punishable under Sections 302/34 of the Indian Penal Code was registered and on the same day at about 02.00 P.M., formal F.I.R. against the appellant and co-accused Sanjay Dubey alias Jhuman Dubey was registered.

4. P.W.10 Mithilesh Kumar Singh took the charge of investigation. He prepared the inquest report, recorded the statements of the witnesses, inspected the place of the occurrence and in course of inspection of the place of the occurrence, he seized the blood stained earth and a piece of blood stained bamboo. He sent the dead body for post-mortem examination and after completion of investigation, submitted the chargesheet.

5. The cognizance of the offence was taken and the case was committed to the court of sessions, in usual way.

6. The sole appellant stood trial before the learned trial court and, accordingly, he was charged for the offence punishable under Section 302 of the Indian Penal Code. The appellant denied the charge and claimed to be tried.

7. In course of trial, prosecution examined, altogether, 10 witnesses and also got exhibited certain



documents as well as one piece of blood stained bamboo as Material Ext.II.

8. The statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure, in which he reiterated his innocence and claimed that on the alleged date of the occurrence, he had gone at the door of the deceased to talk in connection with the measurement of his field but he was assaulted by the deceased.

9. The appellant also got examined one witness, namely, Basu Singh, as D.W.1, who proved the injury report, said to be issued by one Dr. Ragho Kumar Singh, as Ext.A.

10. From perusal of the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure as well as trends of cross-examination of the prosecution witnesses, it appears that the appellant denied the manner of the occurrence and stated that it was deceased, who had assaulted him.

11. Learned trial court after evaluating the evidences, available on the record, and having relied upon the testimonies of the eye witnesses as well as documentary evidences, adduced on behalf of the prosecution, convicted and sentenced the appellant in the manner, as stated above.



12. Learned counsel appearing for the appellant assailed the impugned Judgment of conviction and sentence Order, submitting that the learned trial court has committed error in convicting the appellant and failed to appreciate the evidences, available on the record, in its right perspective. He submitted that, in course of trial, almost all the prosecution witnesses admitted that there was no previous enmity and dispute between the parties but on the alleged date of the occurrence, an altercation took place between the appellant and the father of the deceased on the point of cutting 'Phathar' ('Moonjh') and, in that course, the appellant is said to have given one single blow on the chest of the deceased, as a result whereof the deceased died then and there. He submits that the learned trial court failed to take note of this fact that the prosecution could not succeed to prove the manner of occurrence because some witnesses claimed that the deceased was caught by co-accused from behind, whereas some witnesses stated that the deceased was caught by the co-accused from front side and the aforesaid contradiction in the statements of the prosecution witnesses clearly creates doubt about the manner of occurrence as alleged by the prosecution. He further submitted that it is admitted case of the prosecution that one



blood stained bamboo was recovered from the place of the occurrence and the appellant has claimed, in course of trial, that he was assaulted by the deceased and due to the aforesaid assault, he had sustained injury. He further submitted that the defence witness proved the injury report of the appellant but the prosecution has not explained the injury of the appellant and, therefore, the aforesaid circumstance indicates that the alleged occurrence took place in another manner and not in the manner, as alleged by the prosecution and, therefore, in the aforesaid circumstance, the appellant is entitled to get the benefit of doubt. He further submitted that, moreover, according to the prosecution case as well as the medical evidence, only single injury was found on the chest of the deceased and it is also evident from perusal of the evidence adduced on behalf of the appellant that the appellant, too, had sustained injury in the alleged occurrence and, therefore, the aforesaid facts as well as other circumstances clearly indicate that a sudden fight took place between the parties and in that fight, unfortunately, deceased sustained fatal injury and, therefore, in the aforesaid circumstance, the appellant could not have been convicted for the offence punishable under Section 302 of the Indian Penal Code and, at best, he could have been convicted for the offence



punishable under Section 304 Part-II of the Indian Penal Code.

13. On the other hand, learned Additional Public Prosecutor supported the impugned Judgment of conviction and sentence Order, arguing that all the eye witnesses have, specifically, stated that it was the appellant, who gave dagger blow on the chest of the deceased. The claim of the eye witnesses is corroborated by the medical evidence, i.e., post-mortem report of the deceased. He further submitted that almost all the eye witnesses are family members of the deceased and, according to the prosecution case, the alleged occurrence took place in front of the house of the deceased and, therefore, the presence of the family members of the deceased over the place of the occurrence cannot be disputed and there is no ground to interfere into the impugned Judgment of conviction and sentence Order.

14. Having heard the rival contentions of both the parties, we went through the record along with the Lower Court Records.

15. P.W.2 Amarendra Kumar Dubey, P.W.4 Radhika Devi, P.W.5 Smt. Bibha Devi, P.W.6 Smt. Rita Devi and P.W.7 Deenanath Dubey claimed themselves to be eye witnesses of the alleged occurrence.



16. P.W.1 Birbal Prasad is a formal witness, who proved the writing and signature of A.S.I. Sri Amawas Ram on the formal F.I.R. as Ext.1.

17. P.W.3 Deviramji Dubey is a hearsay witness and claimed that having got information about the alleged occurrence, he went to the clinic of Dr. Bashir Ahmad, where he saw the dead body of the deceased Vijay Kumar Dubey, lying on a cot. This witness further claimed that the fardbeyan of P.W.7 was recorded in his presence. This witness further claimed that he witnessed the aforesaid fardbeyan and he put his signature on the fardbeyan of P.W.7. He proved his signature on the fardbeyan of P.W.7 as Ext.2 and the signature of another witness as Ext.2/1. This witness also claimed that the inquest report of the dead body of the deceased Vijay Kumar Dubey was prepared in his presence. This witness proved his signature on the inquest report as Ext.2/2. This witness, on being cross-examined, admitted that the informant and the appellant are agnates and he came to know that the appellant had also sustained injury in the alleged occurrence.

18. P.W.8 Ali Asghar is a formal witness and there is nothing important in the deposition of this witness.

19. P.W.9 is Dr. D.N. Thakur, who did post-mortem



examination on the corpus of the deceased Vijay Kumar Dubey. This witness claimed that one incised penetrating wound was found on the left side middle of chest below the nipple of the deceased and the size of the wound was 1½” x 1” x cavity deep. This witness further stated that the aforesaid injury was caused by sharp pointed weapon such as dagger. This witness, on being cross-examined, admitted that he did not find any injury on any of the ribs of the deceased. This witness further stated that the approximate space between two ribs is quarter inch to half inch. This witness further admitted that the direction of the injury was horizontal but he had not mentioned the aforesaid fact in the post-mortem report.

20. P.W.10 Mithilesh Kumar Singh is the Investigating Officer. This witness stated that he got an information on 27.11.1990 that the occurrence of stabbing had taken place at village-Harpur and in the aforesaid occurrence, one person died in course of treatment. P.W.10 further stated that he entered a Sanaha of the aforesaid information and proceeded to Sasamusa Bazar, where he recorded the statement of P.W.7, inspected the dead body of the deceased and prepared the inquest report. This witness further stated that, in course of investigation, he recorded the statements of the witnesses and



inspected the place of the occurrence. At paragraph-5 of his examination-in-chief, this witness stated that the place of the occurrence was Sahan of the house of P.W.7 Deenanath Dubey. This witness further stated at the same paragraph that he found the blood in huge quantity at the distance of 10 fts. towards east side from the door of the house of P.W.7 and he also found one piece of bamboo, stained with blood. This witness claimed to have seized the blood stained earth and the aforesaid blood stained bamboo. This witness also stated that at the distance of 15 gauge towards west side from the house of P.W.7, there was house of the appellant. He also found bundle of 'Moonjh' , lying at the distance of 400 yards from the house of P.W.7. This witness produced the blood stained bamboo before the trial court, which was marked as Material Ext.II.

21. P.W.2 Amarendra Kumar Dubey is the elder brother of the deceased Vijay Kumar Dubey. This witness claimed that he along with P.W.7 and his younger brother deceased Vijay Kumar Dubey were talking at their door and, in the meantime, the appellant Devendra Dubey along with his son Jhuman Dubey alias Ajay Dubey came abusing there. He further claimed that his father (P.W.7) tried to calm them down and, in the meantime, his mother also came out of the house.



He further claimed that his mother and father tried to pacify the appellant and his son and his mother started taking away him, his father as well as his younger brother inside the house but, in the meantime, Jhuman Dubey caught hold his brother and the appellant Devendra Dubey gave dagger blow on left chest of the deceased and, thereafter, fled away towards western side along with dagger. He further claimed that his brother sustained injury and he as well as other family members started crying and weeping and having heard the noise, the female members of his family came out of the house and neighbours also assembled there. He further stated that the deceased Vijay Kumar Dubey was brought on a cot to the clinic of Dr. Bashir Ahmad at Sasamusa but the deceased died near the clinic of Dr. Bashir Ahmad. He further claimed that, in the meantime, P.W.10 came there and recorded the fardbeyan of his father (P.W.7). This witness further claimed that one Banka Sonar had brought one bundle of 'Moonjh' at his house but the appellant had quarreled with him as well as his father due to cutting of the aforesaid 'Moonjh'. This witness, on being cross-examined by the defence, admitted that the appellant is his close agnate. This witness also admitted that the partition between the appellant and his family had taken place 25 years back and after partition,



there was no dispute between the appellant and his family in respect of his ancestral property. This witness further stated that the appellant had no share in the land from which the 'Moonjh' had been cut and brought to his house. Moreover, this witness admitted to this extent that there was dispute between the appellant and his family in respect of the land from which 'Moonjh' had been cut and brought and prior to the alleged occurrence, measurement of the aforesaid land had taken place twice. Furthermore, this witness admitted that after the measurement, the dispute in respect of the aforesaid land had already been resolved. He further admitted that 'Moonjh' was brought at his door 5-7 days prior to the alleged occurrence. This witness at paragraph-11 of his cross-examination admitted that the appellant came and asked as to why his 'Moonjh' was cut by them and, after that, his father started pacifying the appellant and, in the meantime, his mother also came there and stopped his father from quarreling with the appellant. He further stated that the deceased was also standing over the place of the occurrence when the occurrence had taken place but he was not participating in the aforesaid quarrel, rather he was quiet and mum at the time of the aforesaid quarrel. This witness further admitted that the appellant did not take any



attempt to assault his father (P.W.7) but, while the deceased was standing there, co-accused Ajay caught hold his waist and, thereafter, the appellant gave dagger blow to the deceased Vijay Kumar Dubey. This witness further admitted that the appellant did not repeat the dagger blow. This witness denied the suggestion of the defence that the deceased had assaulted the appellant with a piece of bamboo. This witness further admitted that he had not stated before the police that the alias name of the accused Jhuman is Ajay.

22. P.W.4 Radhika Devi is the mother of the deceased. She claimed that she was inside her house, when the appellant Devendra Dubey was abusing her husband and sons, namely, Vijay Kumar Dubey (deceased) and Amarendra Dubey (P.W.2). She further claimed that she came out of her house and started pacifying her sons but, in the meantime, Ajay Dubey alias Jhuman Dubey, caught hold her son Vijay Dubey, whereas the appellant Devendra Dubey pierced dagger into the chest of Vijay Dubey and, after that, he along with his son Ajay alias Jhuman Dubey fled away from there. She further claimed that after the occurrence, the deceased was taken to Sasamusa for treatment but, subsequently, she got information that her son Vijay Dubey died. She admitted that the aforesaid occurrence



took place due to dispute of bundle of 'Moonjh'. She further admitted in her cross-examination that prior to the alleged occurrence, there was only dispute between the appellant and her family members in respect of 'Moonjh' and except the aforesaid dispute, there was no any other dispute. This witness also admitted that her husband had purchased the land from which 'Moonjh' was brought to her house and the aforesaid land was not ancestral property. She also admitted that the measurement of the aforesaid land was done prior to the alleged occurrence. This witness further admitted that she forbade her husband as well as sons from quarreling with the appellant and she tried to push her sons into the house but the appellant Devendra Dubey took out dagger and pierced the dagger into the chest of the deceased. She further admitted that the son of the appellant Devendra Dubey was unarmed at the time of the alleged occurrence. This witness denied the suggestion of the defence that her deceased son Vijay Kumar Dubey had assaulted the appellant by means of piece of bamboo.

23. P.W.5 Smt. Bibha Devi is the wife of the deceased Vijay Kumar Dubey. She claimed that having heard the noise, she came out of the house and saw Jhuman Dubey, who caught hold the waist of her husband, and appellant



Devendra Dubey gave dagger blow to her husband. This witness, on being cross-examined, admitted that prior to the alleged occurrence, there was no dispute between the appellant as well as her family. This witness also admitted that her mother-in-law came out of the house after hearing the noise. She, too, followed her mother-in-law. This witness also admitted that when she came out at her door, she saw that her mother-in-law was trying to push her father-in-law into her house. This witness further admitted that when hot exchange of words was going on between the appellant and others, none was carrying any arm and the appellant Devendra Dubey took out dagger, later on. This witness also denied the suggestion of the defence that her husband had assaulted the appellant by means of piece of bamboo.

24. P.W.6 Smt. Rita Devi is the wife of P.W.2 Amarendra Kumar Dubey. She claimed that having heard the noise, she reached at her door and saw that her mother-in-law was pacifying her father-in-law. She also noticed that the appellant and the accused Jhuman Dubey were quarreling with her father-in-law and her mother-in-law was trying to push her father-in-law inside the house but, in the meantime, accused Jhuman Dubey caught hold the waist of the deceased and the



appellant Devendra Dubey gave dagger blow on the left side of the chest of Vijay Kumar Dubey. This witness, on being cross-examined, admitted that the alleged occurrence was witnessed only by her family members and her neighbors had not seen the alleged occurrence. This witness expressed her ignorance about the seizure of blood stained bamboo.

25. P.W.7 Deenanath Dubey is the informant as well as the father of the deceased Vijay Kumar Dubey. This witness supported the prosecution case and stated that while he along with P.W.2 and the deceased Vijay Kumar Dubey was sitting at his door, appellant Devendra Dubey along with his son Ajay Dubey alias Jhuman Dubey came and started abusing him. This witness further claimed that the appellant was abusing him due to bundle of 'Moonjh'. This witness further claimed that his wife Radhika Devi (P.W.4) came there and tried to pacify him and, in the meantime, his two daughters-in-law, too, came there but Jhuman Dubey caught hold the deceased Vijay Kumar Dubey and the appellant Devendra Dubey gave dagger blow on the chest of the deceased. This witness stated that the deceased was taken to Sasamusa for treatment but died before getting any treatment. This witness also stated that the police came at Sasamusa and recorded his fardbeyan. This witness stated that



he put his signature on the fardbeyan, having understood the contents of the fardbeyan. This witness claimed that he had taken the name of Ajay alias Jhuman Dubey in his fardbeyan but P.W.10, mistakenly, wrote the name of Sanjay Dubey in place of Ajay Dubey. This witness further stated that he had filed a petition before the Chief Judicial Magistrate for rectification of the aforesaid defect. This witness, on being cross-examined, admitted that at the time of the alleged occurrence, Sanjay Dubey was aged about 13-14 years. This witness further admitted that he had given the petition before the Chief Judicial Magistrate after 13 days of the alleged occurrence. This witness also admitted that when his fardbeyan was read over to him, he did not raise any objection. This witness further admitted that prior to the alleged occurrence, no altercation had taken place between him and the appellant. This witness also stated that he had purchased the land from which 'Moonjh' was cut but prior to the alleged occurrence, the appellant had never quarreled with him due to cutting of 'Moonjh' from the aforesaid land. However, this witness also admitted that adjacent to the aforesaid land, there is an orchard and the appellant had shared in the aforesaid orchard. He further admitted that Banka Sonar had brought the bundle of 'Moonjh', three days prior to the



alleged occurrence but when the bundle of 'Moonjh' was brought, no quarrel took place between him and the appellant. At paragraph-23 of his cross-examination, this witness admitted that on the alleged date of the occurrence, the appellant came at his door and asked as to why he had cut 'Moonjh' from the field and, thereafter, a hot exchange of words took place between him and the appellant and the appellant started abusing him. This witness further admitted that his wife came there and started pacifying him. He further admitted that his wife was intending to take him into the house but Jhuman Dubey caught hold of his son and, thereafter, the appellant gave a dagger blow to his son. This witness admitted on the same paragraph that neither his family members nor the appellant and other accused had brought any piece of bamboo on the place of the occurrence.

26. On careful perusal of the evidences adduced on behalf of the prosecution, it is emerged that the appellant and P.W.7 are agnates and the alleged occurrence took place on account of cutting of 'Moonjh' from a field, upon which the appellant and P.W.7, both were making their respective claims. Furthermore, it is also emerged out that hot exchange of words took place between the appellant and P.W.7 as well as his two sons and P.W.4 tried to intervene into the aforesaid altercation



and tried to pacify the matter but the appellant is said to have given dagger blow to the deceased. However, the evidence adduced on behalf of the appellant goes to show that on the alleged date of the occurrence, the appellant, too, had sustained injury and, furthermore, the finding of the blood stained bamboo also, prima facie, corroborates the claim of the appellant that the appellant had also sustained injury on the alleged date of the occurrence. Therefore, it is obvious that the alleged occurrence took place due to sudden altercation and fight and it appears that in the aforesaid altercation and fight, the appellant sustained injury, which caused grave provocation to him and due to the aforesaid grave provocation, he gave dagger blow to the deceased. Therefore, in our view, the prosecution has successfully proved this fact that it was the appellant, who gave dagger blow on the chest of the deceased, as a result whereof deceased died subsequently.

27. Now, the question arises as to whether the appellant can be convicted for the offence punishable under Section 302 of the Indian Penal Code?

28. As we have already stated that the alleged occurrence took place due to sudden fight and the appellant had given single dagger blow on the chest of the deceased due to



grave provocation. No doubt, the aforesaid blow became fatal to the deceased but the above stated facts and circumstances go to show that there was no intention of the appellant to commit the murder of the deceased, rather when he got injury at the hands of the deceased, due to grave provocation, he gave dagger blow to the deceased. However, it can easily be gathered that the appellant was, at least, aware of this fact that the blow given by him to the deceased might cause his death or bodily injury and, therefore, the appellant could have been convicted for the offence culpable homicide not amounting to murder punishable under Section 304 Part-II of the Indian Penal Code and the learned trial court committed error in convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code.

29. The appellant has remained in jail custody for more than three years during the course of trial as well as during the pendency of this appeal. Admittedly, the alleged occurrence took place in the year 1990 and at the time of the alleged occurrence, the appellant was aged about 45 years. Now, he has become more than 65 years and, furthermore, it is obvious that the alleged occurrence took place on account of petty dispute and in course of altercation, the appellant exceeded in



causing the injury to the deceased and, therefore, in our view, the appellant has sufficiently been punished by remaining in jail custody for more than three years.

30. On the basis of the aforesaid facts and circumstances,, the conviction of the appellant is converted from Section 302 into Section 304 Part-II of the Indian Penal Code and, accordingly, he is sentenced to the period already undergone in course of trial as well as during the pendency of this appeal.

31. On the basis of the aforesaid discussions, this criminal appeal stands dismissed with the above modification in the Judgment of conviction and sentence Order.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

Pradeep Srivastava/-

AFR/NAFR	AFR
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